



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 8**

**999 18<sup>TH</sup> STREET - SUITE 500**

**DENVER, CO 80202-2466**

**<http://www.epa.gov/region08>**

Ref: 8ENF-L

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

David Galt, Director  
Montana Department of Transportation  
2701 Prospect Avenue  
Helena, MT 59620

Re: Notice of Proposed Assessment of  
Class II Civil Penalty; CWA 404 Violations

Dear Mr. Galt:

Enclosed is a document entitled Administrative Complaint ("complaint"). The United States Environmental Protection Agency ("EPA") is issuing this complaint against the Montana Department of Transportation ("MDT") pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. § 1319. In the complaint, EPA alleges that MDT violated sections 301 and 404 of the Act, 33 U.S.C. §§1311 and 1344, by placement of fill into wetlands adjacent to Big Muddy Creek without a permit during the May 2001 widening construction project of Highway 5 near Plentywood in Sheridan County, Montana. The complaint proposes that a penalty of \$ 70,000 be assessed against MDT for these violations.

These violations are particularly significant for several reasons. First, and foremost, the underlying violation, placement of unauthorized fill in a water of the United States, is against the law. Second, the manner in which the violations were discovered and then remedied was inappropriate. Specifically, MDT staff directed the placement of the unauthorized fill. The unauthorized fill was not identified for 5 months after the initial discharge and then was not removed for 6 months after that. The violations were not reported to the Corps or EPA until 8 months after they were identified. These activities suggest a level of communication and responsibility that must be remedied in light of MDT's recent history with other 404 violations.

MDT has the right to a hearing to contest the factual allegations in the complaint. We have enclosed a copy of 40 C.F.R. part 22, which are the procedures EPA follows in class II penalty assessments. Please note the requirements for an answer to the complaint in 40 C.F.R. § 22.15(b).



*Printed on Recycled Paper*

**If MDT wishes to contest the allegations in the complaint or the penalty proposed in the complaint, MDT must file an answer within thirty (30) days of its receipt of the enclosed complaint to the EPA Region VIII Hearing Clerk at the following address:**

Regional Hearing Clerk (8RC)  
U.S. EPA, Region VIII  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466

If MDT does not file an answer by the applicable deadline [See 40 C.F.R. § 22.15(a)], it may be found in default. A default judgment may impose the full penalty proposed in the complaint (up to \$137,500).

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations [See 40 C.F.R. § 22.18]. If a mutually satisfactory settlement can be reached, it will be formalized in a consent agreement. Upon final approval of the consent agreement by the Regional Judicial Officer, MDT will be bound by the terms of the consent agreement and will waive its right to a hearing on, and judicial appeal of, the agreed upon civil penalty. MDT has the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required.

If MDT has any questions or wishes to discuss settlement of this matter, please contact Elyana R. Sutin, Enforcement Attorney, at (303) 312-6899. **Please note that arranging for a settlement meeting does not relieve MDT of the need to file a timely answer to EPA's complaint.**

Sincerely,

**Sharon L. Kercher for/**

Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance, and  
Environmental Justice

Enclosures:

1. Administrative Complaint
2. Rules of Practice (40 C.F.R. part 22)

cc: Tina Artemis, Regional Hearing Clerk (original + 1 copy)  
Jan Sensibaugh, Director, MDEQ  
John Wardell, Director, 8MO

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

In The Matter of:

Montana Department of Transportation  
2701 Prospect Avenue  
Helena, MT 59620

Respondent.

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ADMINISTRATIVE COMPLAINT

**Docket No.CWA-08-2003-0033**

**I. STATUTORY AUTHORITY**

1. This Administrative Complaint (“complaint”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by section 309(g)(1)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(1)(A), and properly delegated to the undersigned EPA official (“Complainant”).

2. Pursuant to section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits", 40 C.F.R. part 22, a copy of which is enclosed, Complainant hereby proposes the assessment of a civil penalty against Montana Department of Transportation ("Respondent" or “MDT”) for its violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**II. ALLEGATIONS**

1. The Montana Department of Transportation is a political subdivision of the State of Montana.

2. MDT is therefore a “person” as defined by section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3. At all times relevant to this Order, Respondent was responsible for the design and construction of the road, including replacement bridges and culverts, as part of the reconstruction of 10.9 miles of Highway 5 west of Plentywood, Montana.

4. Between May 17, 2001 and June 12, 2001, Respondent, its employees, agents, or contractors, discharged approximately 19,200 cubic yards of earthen fill material into four wetland areas adjacent to and tributary to Big Muddy Creek.

5. Big Muddy Creek is a tributary of the Missouri River, an interstate and navigable water. The approximate locations of the four filled wetland areas are in **Section 13, Township 35N, Range 54E and in Section 18, Township 35N, Range 55E**, Sheridan County, Montana.

6. The placement of fill was for the purpose of wasting excess material encountered from an originally unplanned roadway cut during the process of rebuilding this section of Highway 5. The excess material was removed as a result of encountering a spring in the road cut. This required MDT to alter the grade of the road and dispose of the excess wet fill material.

7. Respondent’s project had been authorized by the Army Corps of Engineers (“Corps”) under Nationwide Permit 23 for a planned 2.5 acres of impact. This authorization was based on meeting specific conditions including limiting the wetland impact to less than 3 acres.

8. On or about May 17, 2001, an MDT employee directed that excess material generated from the construction be placed in wetlands noted in paragraph 5.

9. The discharges described in paragraphs 4 and 8 above were performed using common earth moving equipment operated by Respondent or its agents or contractors.

10. In October of 2001, MDT's environmental biologist discovered the unauthorized fill material. The additional fill impacted a total of 0.761 acres. Therefore, the total amount of impacted wetlands reached 3.281 acres rather than the 2.52 that was planned.

11. Between April 25 and May 23, 2002, the unauthorized fill was removed from the wetlands by MDT to the pre-disturbance ground elevation shown on MDT's road cross sections.

12. On or about June 12, 2002, MDT staff notified the Corps that the unauthorized fill had been placed in wetland areas and then later removed.

13. On June 19, 2002, the Corps inspected the area of unauthorized fill and determined that the removal of fill was done appropriately, with re-growth of plants and re-establishment of typical hydric conditions.

14. Big Muddy Creek and its associated wetlands are tributary to the interstate navigable Missouri River and are each a "navigable water" within the meaning of section 502 of the CWA. 33 U.S.C. § 1362.

15. The earth moving equipment used in Respondent's activities discussed above are each a "point source" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

16. The discharged materials are "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6) and 40 C.F.R. § 230.2.

17. The placement of the discharged material in the wetlands constitutes a "discharge of pollutants" as defined in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

18. The wetlands filled and disturbed by the activities described in paragraphs 4 and 8 above, provide various functions and value, including: wildlife habitat for waterfowl, raptors, and other birds, deer, elk, and other mammals and fish; water quality enhancement; food chain support; ground water recharge and discharge; flood conveyance, storage and peak attenuation; and recreation and aesthetics.

19. Respondent is subject to the provisions of the CWA, 33 U.S.C. § 1251 et seq., including sections 301(a), 308, 309(g), and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1318, 1319(g), and 1344, respectively.

20. The placement of fill in the wetlands described above, violated Nationwide Permit 23 issued by the Corps on May 11, 2000, by impacting greater than 2.52 acres as authorized by the conditions of the permit.

21. Respondent's discharges were carried out without the required authorization from the "Corps", pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

22. On June 18, 2002, the EPA Montana office was notified by the Corps of the violations described above.

23. Each discharge of pollutants from a point source by the Respondent from May 17, 2001 to May 23, 2002 into "navigable waters" without first obtaining the requisite authorization pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

24. Each day the discharges remained in the wetlands without the required permit issued pursuant to section 404 constitutes an additional day of violation of section 301 of the CWA, 33 U.S.C. § 1311.

### **III. PROPOSED ADMINISTRATIVE PENALTY**

Based upon the foregoing allegations, and pursuant to its authority under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA Region VIII hereby proposes to assess an administrative penalty of \$70,000 against the Respondent.

The proposed penalty amount was determined by EPA after taking into account all factors identified at section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), as more fully discussed in Attachment A. These factors include the nature, circumstances, extent and gravity of the violations; Respondent's prior compliance history of such violations and degree of culpability for the cited violations; any economic benefit or savings accruing to Respondent by virtue of the violations; and other matters that justice may require.

### **IV. TERMS OF PAYMENT**

If the Respondent does not contest the findings and assessments set out above, payment of the penalty for the violation may be forwarded to EPA. If such payment is made within 30 calendar days of receipt of this complaint, then no answer need be filed. Penalty payment must be made

by certified or cashier's check payable to "Treasurer, the United States of America," and remitted to:

Regional Hearing Clerk  
P.O. Box 360859 M  
Pittsburgh, Pennsylvania 15251

A copy of the check shall be sent to:

Elyana Sutin  
Enforcement Attorney  
U.S. EPA, Region 8 (8ENF-L)  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466

A transmittal letter identifying the case title and docket number (or written on the check) must accompany the remittance and copies of the check.

Neither the assessment nor the payment of an administrative penalty pursuant to section 309(g) of the CWA shall affect the Respondent's continuing obligation to comply with the CWA or any other Federal, State, or local law or regulation and any compliance order issued under the CWA.

#### **V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

As provided in section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 22.15(c), the Respondent has the right to a hearing in this matter. If the Respondent: (1) contests any material fact upon which the complaint is based, (2) contends that the amount of penalty proposed in the complaint is inappropriate, or (3) contends that it is entitled to judgment as a matter of law, the Respondent must file a written answer in accordance with 40 C.F.R. § 22.15 within thirty (30) days after service of the complaint.



Respondent's answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the complaint, (2) state the circumstances or arguments that are alleged to constitute grounds for defense, (3) state the facts intended to be placed at issue, and (4) specifically request a hearing, if desired. 40 C.F.R. § 22.15(b). Failure to admit, deny, or explain any materially factual allegation contained in the complaint constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). Respondent's answer, an original and one copy, must be filed with:

Regional Hearing Clerk (8RC)  
U.S. EPA, Region 8  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466

A copy of Respondent's answer and all other documents filed in this action must be sent to:

Elyana R. Sutin  
Enforcement Attorney  
U.S. EPA, Region 8 (8ENF-L)  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466

If the Respondent requests a hearing on the proposed penalty assessment, members of the public who have exercised their right to comment on this complaint will have the right to present evidence on the propriety of the penalty assessment. EPA is obligated to give notice of the hearing to those who comment. Section 309(g)(4)(B) of the CWA and 40 C.F.R. § 22.45.

**IF THE RESPONDENT FAILS TO REQUEST A HEARING, IT WILL  
WAIVE ITS RIGHT TO CONTEST ANY OF THE ALLEGATIONS SET  
FORTH IN THE COMPLAINT.**

**IF THE RESPONDENT FAILS TO FILE A WRITTEN ANSWER  
WITHIN THE THIRTY (30) DAY TIME LIMIT, A DEFAULT  
JUDGMENT ENTERED PURSUANT TO 40 C.F.R. § 22.17 MAY  
IMPOSE THE FULL PENALTY PROPOSED IN THE COMPLAINT.**

Members of the public who comment on this complaint during the thirty (30) day period will have an additional thirty (30) days to petition EPA to set aside any consent agreement that may be reached and to hold a public hearing thereon. A petition will be granted and a public hearing held to comment on the consent agreement only if the petitioner's evidence is material and was not considered by EPA in the issuance of the consent agreement. 40 C.F.R. § 22.45(c)(4).

**VI. SETTLEMENT CONFERENCE**

EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation process. If a settlement can be reached, its terms must be expressed in a written consent agreement signed by the parties and incorporated into a final order by the Regional Judicial Officer. 40 C.F.R. § 22.18.

Please direct a request for a settlement conference, or any questions regarding this complaint to:

Elyana R. Sutin  
Enforcement Attorney  
U.S. EPA, Region 8 (8ENF-L)  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466  
(303) 312-6899

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION VIII  
Complainant.

Date: 2-7-03

Sharon L. Kercher for/  
Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 8, MONTANA OFFICE**  
**FEDERAL BUILDING, 10 W. 15<sup>th</sup> STREET, SUITE 3200**  
**HELENA, MONTANA 59626**

**ATTACHMENT A**

Ref: 8MO

January 2, 2003

**MEMORANDUM**

**SUBJECT:** Analysis of Proposed Penalty in Class II Complaint in the Montana Department of Transportation § 404 Violations near Plentywood, Montana

**FROM:** Kristine K. Knutson  
Section 404 Enforcement Program

**TO:** MDT-Plentywood Case File

This memorandum presents an analysis of the factors that are to be considered in determining the amount of the civil penalty to assess in the administrative penalty action against the Respondent in the § 404 violations along US Highway 5 west of Plentywood, Montana. These factors are set forth in Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3). The factors are as follows: (1) the nature, circumstances, extent and gravity of the violations; (2) the Respondents' prior compliance history; (3) the Respondents' degree of culpability; (4) the Respondents' economic benefit or savings resulting from the violations; (5) the Respondents' ability to pay the proposed penalty; and (6) any other matters that justice requires be considered.

The analysis of the required factors mentioned above supports the proposed assessment of a \$70,000 penalty as explained below.

**A. Nature, Circumstances, Extent, and Gravity of Violations**

In considering the above factors, EPA examines the number, type, duration, and significance of the violation or violations, as well as the actual and potential harm to human health and the environment. In the MDT-Plentywood § 404 case, EPA alleges that approximately 0.761 acres of wetlands adjacent to Big Muddy Creek were filled without the authorization required under § 404 of the Clean Water Act.

The wetlands are located within the floodplain of, and are adjacent to, Big Muddy Creek. Big Muddy Creek is a tributary of the interstate and navigable Missouri River. These wetlands provide flood control; cover and habitat for a variety of birds, mammals, amphibians and invertebrates; and filter pollutants thereby improving water quality in Big Muddy Creek.



Although MDT eventually removed the fill, a temporary (about 1 year) loss of these wetland functions did occur. This resulted in habitat fragmentation, and water quality degradation.

By letter dated May 11, 2000, the Army Corps of Engineers ("Corps") verified authorization under Nationwide Permit 23 for MDT's proposed work to widen Montana Highway 5 west of Plentywood, Montana. This authorization was based on meeting specific conditions spelled out in the authorization letter. The authorization included a commendation from the Corps for reducing wetland impacts from the original design plan by using steeper fill slopes between stations 360+80 to 368+00. The use of steeper (3H:1V vs. 6H:1V) fill slopes, combined with other project changes, reduced the total unavoidable wetland impacts on this project from an initial estimate of 8.05 acres to the final planned total of 2.52 acres.

However, during the highway widening project, MDT encountered a spring in the road cut. This resulted in a need to adjust the road grade, and excess wet fill was generated. Les Peterson, then District Construction Engineer for MDT's Glendive District, directed that the excess fill be wasted in the four wetland areas. The unauthorized fill was placed in the wetland areas between May 17 and June 12, 2001. The volume of fill was 15,000 cubic meters, which equals 19,620 cubic yards or 0.761 acres. MDT immediately should have contacted the Corps prior to removing the excess fill.

In October 2001, MDT's Glendive District Biologist, Larry Sickerson, discovered the error and asked the construction managers and contractor to remove the material from the wetlands. The removal occurred between April 25 and May 23 of 2002. Then on June 12, 2002, Stan Sternberg of MDT notified Allan Steinle of the US Army Corps of Engineers of the problem. Due to MDT's history of noncompliance, the Corps forwarded the case to EPA.

## B. Prior Compliance History

EPA filed complaints against MDT for section 404 and 402 violations in Rosebud Creek on the Northern Cheyenne Indian Reservation related to the Highway 314 construction project. An Order was issued 9/22/00 that required MDT to "immediately terminate any and all unauthorized discharges of dredged or fill material to waters of the US without prior authorization by the Corps pursuant to a valid permit issued pursuant to Section 404 of the Clean Water Act." MDT is not in compliance with all of the requirements in the Order based on the recent activity. Those complaints were settled May, 2002. In 1999 the COE collected a penalty from MDT for unauthorized riprapping (rock berms) and extensive disturbance of a half mile of stream bottom in the Yellowstone River.

More disturbingly are a host of violations by MDT for permit non-compliance and /or deviation from the original project without consulting the Corps, in relation to bridge rework on highway projects. In 2002, the Buckingham Coulee project, removal of an existing bridge, and

replacement with a new one, was found to be in violation of NWP 23. The permit was authorized in 2001 with an updated authorization in February, 2002. The use of a different culvert and smaller rock than planned constituted non-compliance with MDT's permit terms and conditions. In 2001, permit non-compliance occurred in Lolo Creek on the US 93 highway reconstruction project with fill material placed in the Creek. In 2002, the State of Montana DEQ and Fish, Wildlife and Parks, respectively, have also notified MDT for alleged violations on the Como Bridge project north of Darby, Montana, the Shields River Bridge in Clyde Park and the Warren North and South Project along Sage Creek.

### C. Degree of Culpability

The fill placement was done at the direction of MDT field personnel who had construction plans that clearly showed the areas of fill were wetlands, and the plans further showed the precise limits of the authorized fill. MDT staff had knowledge of the environmental permitting process and knew the limits of the original authorization. The decision to waste material in a Water of the United States was apparently made because of the convenience of the location.

The Respondent has an affirmative responsibility to comply with the requirements of Section 404. Moreover, EPA's past enforcement actions with MDT should have increased MDT's awareness of the importance of permit compliance and the need to avoid wetland impacts. The Respondent had a duty to know about, and to comply with, the requirements of Section 404 and had control over and responsibility for the conduct of involved MDT staff and contractors.

In sum, the recent violations along with events on other projects, calls into question MDT's ability to control what is constructed. MDT's designs, and all permits based on those designs, may be of little or no value if such changes are made during construction. Projects need to be constructed as designed and permitted.

**THESE DOCUMENTS WERE FILED WITH THE REGIONAL HEARING CLERK'S  
OFFICE ON FEBRUARY 7, 2003.**